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# Trial by Newspaper: Should It Continue?

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## TRIAL BY NEWSPAPER: SHOULD IT CONTINUE?

## INTRODUCTION

This article is an attempt to present the existing problems, both ethical and social, which occur as a result of the newspaper publicity given to criminal trials and the events preceding the trial. While the injustice of "trial by newspaper" affects both civil and criminal cases, this article will be concerned primarily with the latter since a study of the case material reveals that it is in the criminal cases that the most flagrant violations of the rights of the accused occur.

The greatest objection to publicity of criminal cases is directed at the reporting of the events preceding the trial and those surrounding the crime, and not so much the reporting of the events which transpire in the courtroom; although there is abuse, even here. Here again we are concerned primarily with the former.

The problems arising from the reporting of crimes and criminal trials, along with some of the arguments both pro and con, and various solutions to the problem are presented here.

## CRIME REPORTING

In *Irvn v. Dowd*,<sup>1</sup> the petitioner's brief had forty-six exhibits attached to it containing a barrage of newspaper headlines, articles, cartoons, and pictures that were unleashed against the petitioner during the six or seven months preceding his trial. The newspapers in which the stories appeared were delivered regularly to approximately 95% of the dwellings of the county, and, in addition, the Evansville radio and television stations, which likewise blanketed the county, also carried extensive newscasts covering the same incidents. These stories revealed the details of the petitioner's background, including a reference to crimes committed when a juvenile, his convictions for arson, almost 20 years previously, and for burglary and of a court-martial on AWOL charges during the war. He was also accused of being a parole violator. The headlines announced his police lineup identification, that he faced a lie detector test, had been placed at the scene of the crime, and that the six murders were solved, but that petitioner refused to confess. Finally, they announced his confession to the six murders, and the fact of his indictment for four of them in Indiana. They reported petitioner's offer to plead guilty if promised a ninety-nine year sentence, but also the determination,

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<sup>1</sup> 366 U.S. 717, 725 (1961).

on the other hand, of the prosecutor to secure the death penalty, and that petitioner had confessed to 24 burglaries (the *modus operandi* of these robberies was compared to that of the six murders and the similarity noted). One story dramatically relayed the promise of a sheriff to devote his life to securing petitioner's execution by the State of Kentucky, where petitioner is alleged to have committed one of the six murders, if Indiana failed to do so. Another story characterized petitioner as remorseless and without conscience, but also as having been found sane by a court appointed panel of doctors. In many of the stories, petitioner was described as the "confessed slayer of six," a parole violator, and fraudulent-check artist. Petitioner's court appointed counsel was quoted as having received "much criticism over being Irvin's counsel," and it was pointed out, by way of excusing the attorney, that he would be subject to disbarment should he refuse to represent Irvin (the petitioner). On the day of the trial the newspapers carried the story that the petitioner had orally admitted the murder of Kerr (the victim in this case) as well as "the robbery murder of Mrs. Wilhelmina Sailer in Posey County, and the slaughter of three members of the Duncan family in Henderson County, Kentucky."

The petitioner's brief went on to say that on the second day of the trial, devoted to selection of the jury, the newspapers reported that "strong feelings, often bitter and angry, rumbled to the surface," and that "the extent to which the multiple murders—three in one family—have aroused feelings throughout the area was emphasized Friday when 27 of the 35 prospective jurors questioned were excused for holding biased pretrial opinions. . . ."<sup>2</sup>

In *Stroble v. California*,<sup>3</sup> it was alleged by petitioner (accused of child molesting and murder) that newspaper accounts of his arrest and confession were so inflammatory as to make a fair trial in the Los Angeles area impossible. On the day of petitioner's arrest the newspapers printed extensive excerpts from his confession in the District Attorney's office, the details of the confession having been released by the District Attorney at periodic intervals while petitioner was giving the confession. The search and apprehension of petitioner was attended by much newspaper publicity. Petitioner was variously described, both in headlines and in the text of news stories, as a "werewolf," a "fiend," and as a "sex-mad killer." The District Attorney announced to the press his belief that petitioner was guilty and sane. During the month of December, at a special

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<sup>2</sup> 366 U.S. 717, 726 (1961).

<sup>3</sup> 343 U.S. 181 (1952).

session of the legislature called to consider the problem of "sex crimes," the District Attorney, at hearings held in Los Angeles for one of the investigating committees, stated that he did not see why sex offenders "should not be disposed of the same way" as mad dogs. Los Angeles newspapers published accounts of these events, and the accounts at times made reference to the murder with which petitioner was charged.

These are two very good examples of what is commonly called "trial by newspaper." In newspaper reports such as these the press aided by prosecutors and police officers violate practically every constitutional right that an accused criminal has, and as will be seen the public—the citizen—is the only one who eventually must pay for these atrocities.

Fortunately the Supreme Court reversed the conviction in the *Irvin* case, finding that the news media had poisoned the minds of the potential jurors in the jurisdiction.<sup>4</sup> But the Court in *Stroble* ignored the abuse and name calling tactics of the newspapers, and also the damaging comments made by the District Attorney, and based their decision solely on the publication of the confession made by the accused, refusing to reverse the conviction.<sup>5</sup>

Trial by newspaper is more than just an expression with today's modern methods of news dissemination. It becomes increasingly harder to find jurors who have not read or heard reports of the crime, and who have not formed a fixed opinion as to the accused's guilt, making it extremely difficult to provide the accused an impartial jury which he is entitled to under the United States Constitution. But besides the problem of the accused getting a fair trial, there are other factors which add to the severity of the overall problem, the main one being the first amendment right of freedom of the press. Let us examine these other factors.

#### THE INTERESTS TO BE BALANCED

At first glance, the problem of trial by newspaper seems to be a clash between the first and sixth amendments (fourteenth amend-

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<sup>4</sup> 366 U.S. 717, 727 (1960). The Court in *Delaney v. United States*, 199 F.2d 107, 39 A.L.R.2d 1300 said:

"Where one's life is at stake—and accounting for the frailties of human nature—we can only say that in light of the circumstances here the finding of impartiality does not meet constitutional standards."

<sup>5</sup> Quoting the Court, 343 U.S. 181, at 193:

"Petitioner has not shown how the publication of a portion of that confession four days earlier prejudiced the jury in arriving at their verdict. . . ." The Court reasoned that the confession was part of the record, and the record is available to the press, for what transpires in the courtroom is public property."

ment where the states are concerned) of the United States Constitution, but the problem is much broader than that, and ultimately it is simply one of the right of the citizen to be informed versus his right to be free from detriment through crime, and the question of which one is more important.

The purpose of freedom of the press is to "assure unfettered interchange of ideas for the bringing about of social changes desired by the public."<sup>6</sup> James Madison and Thomas Jefferson were very clear in their own minds about the place the press should have in our free society. Madison, who offered the first amendment, said, "The right of freedom of speech is secured: the liberty of the press is expressly declared to be beyond the reach of government."<sup>7</sup> Jefferson was equally succinct in this passage: "The basis of our government being the opinion of the people, the very first object should be to keep that right. And were it to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter."<sup>8</sup>

No one will doubt that the freedom to express one's thoughts and opinions, and the right to exchange ideas lies at the root of democracy, for without these, there is no democracy. But does the right to exchange political ideas necessarily include the right to incriminate one accused of a crime under the guise of news reporting?<sup>9</sup> Besides his right to a trial by an impartial jury, does not one accused of a crime have a right to be free from certain unwarranted invasions of his privacy?<sup>10</sup> Shouldn't the press be prevented from publicizing certain material about the accused which is prejudicial, and which would probably be inadmissible at the trial? And couldn't the newspapers be fined for contempt<sup>11</sup> for violating these

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<sup>6</sup> *Roth v. United States*, 354 U.S. 476, 484 (1957).

<sup>7</sup> Daly, *Ensuring Fair Trial and a Free Press*, 50 A.B.A.J. 1037 (1964).

<sup>8</sup> *Ibid.*

<sup>9</sup> See Comment, 36 *Notre Dame Law*. 77 (1960).

<sup>10</sup> See *Birmingham Broadcasting Co. v. Bell*, 259 Ala. 656, 68 So. 2d 314 (1953), where the court said at 662:

"A public character does relinquish a part of his right of privacy . . . , but such a waiver is limited to that which may be legitimately necessary and proper for public information."

See also, *In re Mack*, 386 Pa. 251, 126 A.2d 679 (1956), upholding on a right of privacy theory a contempt citation against a news photographer for taking pictures of the accused at the trial.

<sup>11</sup> Some argue that contempt citations would undermine freedom of the press, and would be in a sense, prior restraint, which is clearly prohibited by the Supreme Court. *Near v. Minnesota*, 283 U.S. 697, 716 (1931). However, in *Bridges v. California*, 314 U.S. 252, 290 (1941), Frankfurter dissenting, said:

"The conventional power to punish for contempt is not a censorship in advance, but a punishment for past conduct, and as such, . . . is not offensive either to the First or Fourteenth Amendments."

See also *Consensus of Reform of Sensational Reporting*, 20 J. Am. Jud. Soc'y. 83, 84 (1936).

rights of the accused, and for interfering with the administration of justice? It seems to be within the realm of possibility.

An argument can be made that contempt citations are unconstitutional because they prohibit freedom of the press and free expression, but there seems to be an important distinction to be drawn between political speech cases and the newspaper contempt cases. In the former, the ideas and utterances being suppressed go to the very heart of the democratic process. But the opinions and statements of the newspapers concerning a pending criminal matter touch upon individual liberty, the preservation of which, after all, is a prerequisite to a free society. Viewing the problem in light of this distinction, there seems to be equally as good an argument supporting contempt citations.

Publication of the arrest and arraignment of one accused of a crime appears to be both appropriate and necessary, since the public is entitled to know what progress police and other authorities are making towards solving and preventing crime. But is there any rationalization for publicizing the accused's past criminal record, or for bringing out details of his family background, viz., that he came from a broken home, or that he was born illegitimate, or that his mother had been committed to an insane asylum. Does "freedom of the press" necessarily incorporate information of this type? These facts are generally not allowed to go before the jury at the trial, so why let them be printed in the paper, allowing the press to do indirectly what the prosecuting attorney cannot do directly. And in many instances it is the prosecuting attorney who gave the information to the newspapers in the first place.

One reason for allowing collateral information is the Supreme Court decision in *Near v. Minnesota*.<sup>12</sup> In that case, which involved an attack by a newspaper on the Minneapolis county attorney, the Court condemned prior restraint as an infringement of the liberty of the press. But the *Near* case did not involve trial by newspaper, so the "prior restraint" test may not be applicable in the event an attempt is made to prevent certain disclosures by the press of information which is prejudicial to the accused, and which would probably be inadmissible at the trial. Besides, the press has not been allowed to go wholly unrestrained in all fields. Certain restrictions have been levied where obscenity, libel, treason and espionage are concerned, and in each of these situations it is presumed that some right greater than the public's right to be informed is at stake. The courts in obscenity cases have felt that there is no social value in

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<sup>12</sup> 283 U.S. 697 (1931).

permitting the publication of such material. Libel, they say, is an intentional unwarranted invasion of one's right of privacy, which the press has no right to publicize. Treason and espionage come under the evidentiary rule of governmental privilege, since it is felt that the need for governmental security outweighs the need of the public to be informed on these matters. If the newspapers can be restrained in these situations it is possible that they can be and should be restrained in the criminal publicity cases.

It is said in the above mentioned situations that a right greater than the public's right to be informed is sought to be protected; then what of the accused's right to a speedy, public, and fair trial; his right to confrontation and cross-examination of his accuser; his right not to be compelled to incriminate himself; and his right to be free from unreasonable searches and seizures. Each of these constitutionally guaranteed rights can be violated by an overzealous reporter in his attempt to "get the story," yet the press justifies its actions on the basis that the public should be informed. To subject the accused to a "public" trial by the press without his constitutional, procedural, and evidentiary safeguards, and to allow the minds of his judges and jurors to be poisoned by inadmissible evidence which comes out of context and without benefit of cross-examination is to simply tip the scales of justice against the accused, and to make mockery of the sixth amendment guarantee of "trial by an impartial jury." Can we honestly say that restraint is not needed in this area?

Some sympathizers of the press contend that publication of information about the accused serves as a crime deterrent. The thinking here, being, that the publication of information about the accused's past, printing his picture in the paper, and associating him with friends and relatives is embarrassing to him and degrading to the friends and relatives, and thus, discourages future crime on his part, and also discourages those who may be about to commit a crime of some sort. However, it is difficult to see how the mere publication of a criminal's acts will have any sobering effect on potential criminals who are about to perpetrate a crime. At any rate, there doesn't seem to be any statistics available to substantiate such a theory.

Another theory quite often expounded by those favoring freedom of the press is that unrestrained publication of crimes and criminal proceedings encourages police, prosecutors, and the judiciary to maintain high standards while performing their official duties, for

fear that the newspapers will criticize their actions.<sup>13</sup> But in *Pennekamp v. Florida*,<sup>14</sup> Justice Frankfurter, in a concurring opinion said:

Of course freedom of speech and of the press leads to the enlightenment of a free people, and in restraining those who wield power. Particularly should this freedom be employed in comment upon the work of courts. . . . But the Bill of Rights is not self-destructive. Freedom of expression can hardly carry implications that nullify the guarantees of impartial trials. The need is great that courts be criticized, but just as great that they be allowed to do their duty.

Undoubtedly, the press can be a great help in exposing public officials who fail to properly exercise the responsibilities of their offices, and this use of the press is not to be discouraged. But as was pointed out earlier, our main objection is to the reporting of the crime and the circumstances surrounding the crime, and not so much a criticism of what takes place at the trial. (With exception, of course, to publication of information which would probably be inadmissible at the trial, and the publishing of events in the courtroom which the jury is not supposed to hear or see.)

Thus far, our attention has been directed more or less at the public's right to be informed, or why the press should publish reports of crimes and criminal trials. Now we turn our attention to the right of the accused criminal to a fair trial, and the right of the public to be free from detriment through crime.<sup>15</sup>

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."<sup>16</sup> The guarantee of the sixth amendment is made applicable to state prosecutions by the due process clause of the fourteenth amendment.<sup>17</sup> An essential ingredient of that right is that an accused be tried by jurors whose verdict is based solely upon a consideration of competent evidence received in open court. Yet in many instances, far too many, the accused is tried in the daily newspapers by editors and reporters who are totally ignorant of trial procedure and the rules of evidence.<sup>18</sup> One need go no further than his daily newspaper to

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<sup>13</sup> *Craig v. Harney*, 331 U.S. 367 (1947), where publication in a newspaper vehemently attacked the trial judge. See also *Bridges v. California*, 314 U.S. 252 (1941), and *Pennekamp v. Florida*, 328 U.S. 331 (1946).

<sup>14</sup> 328 U.S. 331, 336 (1946).

<sup>15</sup> This applies, of course, to the right of every citizen to have a fair trial, and the right of the public to have criminals punished.

<sup>16</sup> U.S. Constitution, Amend. VI.

<sup>17</sup> *In re Murchinson*, 349 U.S. 133 (1955); *In re Oliver*, 333 U.S. 257, 266-73 (1948).

<sup>18</sup> See examples of reports of crimes which violate the rules of evidence and the accused's rights, *supra* 1-3.



find examples of the type of abuse which was levied at the defendants in the *Irvin* and *Stroble* cases.

In criminal actions, certain evidence is excluded because of its tendency to "confuse, mislead, or prejudice the juries."<sup>19</sup> Mere suspicion, choice of possibility or probability, surmise, speculation, conjecture, and insinuations are not regarded as evidence in a judicial proceeding,<sup>20</sup> but all of these can be found in reports of criminal cases by the newspapers, especially where the crime involved is a violent one or is a sex crime. Can the accused be afforded a fair trial when during the months and weeks preceding the trial the community and the area from which his jurors must be drawn is saturated with accounts by the newspapers of every aspect of the crime, including: the investigation; the accused's past criminal activities; the capture; the confession, whether it be voluntary or involuntary; statements by the police and prosecutors whom may not be called as witnesses at the trial, and whom the defendant will never have a chance to cross-examine? Does the accused begin the trial "innocent until proven guilty?"

Many will argue that through the use of the *voir dire* examination, change of venue, continuance, cautionary instructions, and isolation of the jury that the prejudice generated by the publicizing of the crime and the trial is minimized, with the end result being a victory for both the press and the right of fair trial. This, however does not appear to be a truism. First of all, *voir dire* examination has been weakened considerably by the announcement of the Court in the *Irvin* case<sup>21</sup> that the constitutional guarantee of a fair trial does not require "that jurors be totally ignorant of the facts and issue involved." The Court went on to say, "It is sufficient if the juror can lay aside his impression or opinion, and render a verdict based on the evidence presented in court."<sup>22</sup> *Spies v. People of State of Illinois*, 123 U.S. 131; *Holt v. U.S.*, 218 U.S. 245; *Reynolds v. United States*, supra. Thinking such as that shown by the trial court in the *Irvin* case allowed the accused in that case to be tried by jurors who admitted to holding preconceived notions as to the accused's guilt.<sup>23</sup> The remedy of change of venue also leaves something to be desired, since the burden of proving that defendant cannot get a fair trial

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<sup>19</sup> Report of the Crime Commission of the State of New York, 307, 319-20 (1927). This report revealed that publicity is capable of producing opinions and attitudes.

<sup>20</sup> Conrad, *Modern Trial Evidence*.

<sup>21</sup> See supra note 1.

<sup>22</sup> 366 U.S. at 723 (1961).

<sup>23</sup> *Ibid.* See also *Duncan v. California*, 53 Cal. 2d 803, 807 (1960), where three jurors with a fixed opinion of defendant's guilt were admitted to the panel.

in the present venue is extremely difficult, because the proof necessarily involves the task of showing that the minds of the potential jurors have been so thoroughly prejudiced as to make it next to impossible to change their minds.<sup>24</sup> The same seems to be true with the other remedies offered to the defendant, namely, that they are of little help in overcoming the impressions which have been created by the press.

From what we have seen, it is rather apparent that one accused of a crime has the cards stacked against him once the newspapers "go to work" on the case. Without really understanding the problems they cause, and in many instances not caring,<sup>25</sup> reporters and editors alike make justice for the accused virtually impossible, and at the same time, prevent the governments, state and federal, from making adequate prosecutions of criminals who, in most instances, rightfully belong behind bars. But still another problem exists within the main problem, and that is the cost to the taxpayer, arising out of reversals and new trials.

In his dissent in the *Irvin* case,<sup>26</sup> Justice Frankfurter said:

Not a term passes without this Court being importuned to review convictions had in states throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts. . . .

It would be interesting indeed if the cost, the needless cost, of excess litigation due to prejudicial newspaper publicity could be determined. Undoubtedly, the figure if it were ascertainable would run into millions of dollars. Not only is there a shameful waste of money and human resources every time a trial is continued or reversed, the burden of which is usually borne by the state or federal government since in many instances the accused is an indigent; but quite often the criminal, because his rights have been so flagrantly violated, is allowed to go free! What rationalization can there be for allowing the press to limit the effectiveness of our system of justice, and at the same time increase the cost of criminal prosecution to ridiculous proportions? Is freedom of the press the justification for these anomalies? Just how great is this need of the public to know all the gory details of the crime; or the need to read statements by the accused and others made at a time when their emotions rather than their intelligence guides their actions; or the need to participate vicariously in the investigation and the trial through the eyes of the

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<sup>24</sup> See *supra* note 22.

<sup>25</sup> Polls taken at press conventions show that some newspapermen are aware of and concerned about the problem of "trial by newspaper."

<sup>26</sup> 366 U.S. at 730 (1961).

reporter or editor who is more interested in a promotion or selling newspapers than in seeing that the rights of the accused are not violated? The interests of all concerned don't seem to balance out very well. In fact, it appears that what you have is a system where the press profits due to increased subscriptions caused by sensational crime reporting; the state and federal governments being burdened with additional costs in the prosecution of criminals, due to the mistrials, reversals, continuances, etc. (And it seems appropriate to add that ultimately the public will pay for the additional costs of prosecutions through increased taxation.) Criminals are allowed to be turned loose on society because they could not get a fair trial, yet the instigator of it all, the press, is permitted to go unpunished! It is strange indeed, this system which penalizes so many while letting the violator remain undisciplined.

### A SOLUTION

In attempting to arrive at any type of workable solution to combat the injustice of "trial by newspaper" one must at all times bear in mind the first amendment, and the guarantees of freedom of the press.

The old adage that "an ounce of prevention is worth a pound of cure" is as true in relation to the problem of "trial by newspaper" as it is to any other. It would certainly be worthwhile to attempt to find a method which would prevent "trial by newspaper" as opposed to one which would merely punish for such misconduct. The solution herein proposed is to stop the information at its source, the police and prosecuting attorneys being the main source, and ways in which these groups can lawfully be prevented from divulging prejudicial material to the newspapers.

The problem, as it pertains to the police, would be a relatively simple one. Since police and other law enforcement officers are all officials of the state, their behavior as it affects the governmental process of conducting trials can be regulated by the state by statute,<sup>27</sup> or by the local bar association, or by the police department.<sup>28</sup> Since the police and courts must act collectively in preventing crime and providing justice for all, it necessarily follows that any action on the part of the police, or the judiciary, which would tend to impair the smooth functioning of these governmental processes could lawfully and constitutionally be prohibited.

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<sup>27</sup> *Baltimore Radio Show v. State*, 193 Md. 300, 67 A.2d 497, (1949); *cert. denied*, 338 U.S. 912 (1950).

<sup>28</sup> The bar association could take disciplinary action against those who violate Canon 20, and the police could establish some similar standard.

The problem so far as it is related to prosecuting and defense attorneys still does not present too great an enigma. The actions of attorneys could be closely checked, either by a strict application of Canon 20,<sup>29</sup> or a revision and redrafting of the Canon to make it more useful.<sup>30</sup> Canon 20 was designed to prevent attorneys from divulging information to the newspapers, but it has been very ineffective either because its wording is ambiguous, or because the Bar has lagged in its enforcement of the Canon.<sup>31</sup> From reading the Canon one might surmise that the latter of the two reasons best contributes to its ineffectiveness. At any rate, it appears that a strict enforcement of the Canon with internal disciplinary action for its violation would certainly prevent the divulgence of a substantial amount of the information which tends to prejudice the people against the accused.

Removing the police and attorneys from the picture as an information source would do a great deal to alleviate the problem, but it may be doubted if this would be wholly effective in light of the newsman's statutory privilege against being compelled to reveal his source of information.<sup>32</sup> In states where these statutes are in force, the police and attorneys could make statements to reporters without fear of being exposed. Therefore the problem cannot be eliminated by attacking the source of the information, but will require other measures to complement it.

The solution which would seem to have the best possible chance of success is one which would provide a statute enumerating the types of information which should not be printed by the press, along with the English rule of fining for contempt those who violate the statute. The statute would set out the types of material that are prejudicial to the accused, and this would act as a guideline for the reporters and editors when writing their stories. This has long been one of the arguments of reporters and editors, viz., that they are not lawyers, and therefore, they have no way of knowing what is and what is not admissible at the trial.

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<sup>29</sup> American Bar Association Professional Code of Ethics. Canon 20 reads in part:

"Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. . . ."

<sup>30</sup> Situations which might call for statements to the press might be enumerated in the Canon.

<sup>31</sup> No cases were found involving an interpretation of Canon 20. *But see*, Opinion 199 of the A.B.A. Committee on Professional Ethics and Grievance (1935), reprinted in A.B.A., *Opinions of the Committee on Professional Ethics and Grievances* 400 (1957).

<sup>32</sup> Compulsory Disclosure of a Newsman's Source, 54 Nw. U.L. Rev. 243 (1959). Most states grant the newsman's privilege by statute.

If a statute were drafted it might contain language to this effect:

Sec. 2. OMISSION OF PREJUDICIAL INFORMATION—The following items should be omitted from the newspaper reports of crimes and criminal trials:

1. *Confessions*—voluntary or involuntary. Until it is determined whether confessions will be admissible at the trial, they should not be printed.
2. *The Accused's Past Criminal Activities*—These are usually prejudicial and inadmissible.
3. *Tangible Evidence*—Until it is determined whether evidence connecting the defendant with the crime was obtained under a legal search and seizure, and the extent of its admissibility at the trial, such evidence should not be printed.
4. *Statements by Unsworn Witnesses*—Statements made by witnesses who are not required to testify at the trial, and who the defendant will not have opportunity to cross-examine should not be printed.
5. *Events and Proceedings From Which the Jury Has Been Excluded*—Events and proceedings which take place in the courtroom which the jury is not supposed to know should not be printed. This would occur at pretrial conferences and hearings.

While more detail would be needed to draft a workable statute, the example set forth above would present the draftsman a good framework with which to begin.

For any statute to be effective for the purpose for which it is designed, it must necessarily be buttressed by some sort of punishment for its violation. The English courts have long recognized the doctrine of criminal contempt, and have seen fit to develop it and apply it to the press where news reports of a crime endanger the fairness of a trial. In *Roach v. Garvin*,<sup>33</sup> the English court said:

There are three different sorts of contempt. One kind of contempt is scandalizing the Court itself. There may be likewise a contempt of this Court in abusing parties who are concerned in causes here. There may be also a contempt of this Court, in prejudicing mankind against persons, before the cause is heard.

While this statement of the English court might not have been directed at newspapers, it is plain to see that the court in that country very early recognized that one accused of crime could be denied a fair trial if his jurors were prejudiced against him before the trial. The English court also recognized that the contempt power was the most effective way of dealing with this outside interference with the judiciary process. I think that the contempt power could be similarly used in this country,<sup>34</sup> even though the Supreme Court has

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<sup>33</sup> 2 Atk. 469 (1742).

<sup>34</sup> See Nelles and King, *Contempt by Publication in the United States* (1928); 28 Col. L. Rev. 401, 525 (1938); 48 Yale L.J. 54 (1938); 7 Geo. Wash. L. Rev. 234 (1938).

ruled that one cannot constitutionally be held in contempt of court unless the utterances will create a "clear and present danger" that they will influence the determination of a case.<sup>35</sup>

The decision of the Court in *Irvin v. Dowd*<sup>36</sup> suggests that the Court is beginning to take cognizance of the undesirable consequences of excessive and unrestrained pretrial publicity. *The Warren Report*,<sup>37</sup> too, gives an indication that the Supreme Court may be changing its attitude about "trial by newspaper," and might be ready to extend the use of the contempt power. At any rate, it appears to be a good bet that contempt charges against newspapers may be seen more in the future than they have been in the past, at least in criminal cases.<sup>38</sup>

The American Bar Association has shown that it is concerned about the problem, and has recently appointed a panel of eleven nationally prominent lawyers and judges to serve as the Advisory Committee on Fair Trial-Free Press.<sup>39</sup> The committee will consider the responsibilities of members of the bar, as well as responsibilities of law enforcement officials, the press, television and radio, as they relate to preservation of fair trial and avoidance of prejudicial publicity. Although the over-all national program will require three years to complete, the fair trial and free press phase of the program will be accorded priority, because of its urgency in the light of the Warren Commission's findings.

### CONCLUSION

As can be seen, the problem of "trial by newspaper" is not just a legal ethics problem, but touches other phases of our society. It seems clear that the problem cannot be solved merely by "taking the Bar by the horns." Nor can we leave the problem to the journalists, for though they would have us believe that theirs is purely a public interest, "their motive is the sordid one of increasing their profits, unmindful of the result to the unfortunate wretch who may ultimately have to stand his trial for murder."<sup>40</sup> The answer must come,

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<sup>35</sup> *Bridges v. California*, 314 U.S. 252 (1941).

<sup>36</sup> See *supra* note 1.

<sup>37</sup> Report of the Committee headed by Chief Justice Earl Warren, and formed to investigate the assassination of President John F. Kennedy, the arrest and killing of Lee Harvey Oswald, and the trial of Jack Ruby.

<sup>38</sup> The *Bridges* case, the *Pennekamp* case, and the *Craig* case, see *supra* notes 35, 14, and 13 respectively, did not involve jury trials, and it is possible that the "clear and present danger" test will not be used in cases where a jury, rather than a judge, is the fact finder.

<sup>39</sup> American Bar Association News, Dec. 6, 1964.

<sup>40</sup> Gilman, *The Truth Behind the News* (June, 1933), 29 American Mercury 139.

if at all, from the legislatures through the enactment of a law preventing the printing of certain types of prejudicial information, along with the use of the contempt power by a wise and intelligent judiciary.

*William R. Hamlin*